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In The

# *Supreme Court of the United States*

October Term, 1969

No. 268

CHARLES LEE PARKER,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA.

## BRIEF FOR RESPONDENT

## CITATION TO OPINION BELOW

The opinion of the Court of Appeals of North Carolina (A. pp.92-99) is reported at 2 N.C. App. 27, 162 S.E.2d 526 (1968).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## QUESTIONS PRESENTED

I. WHETHER IT IS A DENIAL OF THE PRISONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN A STATE PROCEEDING, FOR THE PRISONER TO BE PRECLUDED FROM PROVING THE LACK OF JURISDICTION OF THE COURT IN WHICH HE WAS TRIED AND CONVICTED BECAUSE OF RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

WHICH INDICTED HIM, ON THE GROUND OF HIS FAILURE TO MAKE A MOTION TO QUASH THE INDICTMENT, WHEN IT IS UNCONTRADICTED THAT THE PRISONER DID NOT KNOW OF HIS RIGHT TO INDICTMENT BY A GRAND JURY FREE OF RACIAL DISCRIMINATION, AND DID NOT VOLUNTARILY RELINQUISH THIS RIGHT?

II. WHETHER IT IS A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN A STATE PROCEEDING, FOR THE DEFENDANT TO BE CONVICTED AND SENTENCED TO LIFE IMPRISONMENT FOR THE CAPITAL OFFENSE OF BURGLARY, UPON A GUILTY PLEA, UNDER A STATUTORY PROCEDURE WHEREBY A PLEA OF NOT GUILTY INVOLVES THE THREAT OF CAPITAL PUNISHMENT, BUT A PLEA OF GUILTY IMMUNIZES THE DEFENDANT FROM CAPITAL PUNISHMENT, IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT THIS STATUTORY ARRANGEMENT DID NOT INFLUENCE THE DEFENDANT TO PLEAD GUILTY?

III. WHETHER IT IS A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN A STATE PROCEEDING, FOR A PLEA OF GUILTY TO BE ALLOWED TO SUPPORT A CONVICTION AND LIFE SENTENCE FOR THE CRIME OF BURGLARY, WHERE A PRIOR INVOLUNTARY CONFESSION WAS OBTAINED FROM THE DEFENDANT, THE DEFENDANT BELIEVED THIS CONFESSION WOULD BE USED AGAINST HIM IF HE PLEADED NOT GUILTY, AND THE STATE HAS

NOT ESTABLISHED BEYOND A REASONABLE DOUBT A LACK OF CONNECTION BETWEEN THE COERCED CONFESSION AND THE GUILTY PLEA?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

### AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

### AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of North Carolina:

ARTICLE I, SECTION 13:

RIGHT OF JURY.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal.

General Statutes of North Carolina:

N.C.G.S. §14-52 (1953)

PUNISHMENT FOR BURGLARY.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court.

N. C. G. S. § 15-162.1 (1956)

PLEA OF GUILTY OF FIRST DEGREE MURDER, FIRST DEGREE BURGLARY, ARSON OR RAPE. (a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

(c) Unless and until the State accepts such plea, no reference shall be made in open court at the time of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State.

## STATEMENT OF THE CASE

At the August 1964 Session of the Superior Court of Halifax County, North Carolina, the petitioner, Charles Lee Parker, pleaded guilty to an indictment charging first degree burglary and was sentenced to life imprisonment. Proceedings were commenced by the filing of a petition verified July 9, 1967, under the North Carolina Post-Conviction Hearing Act, N.C.-G.S. 15-217, et seq., in the Superior Court of Halifax County (A. pp. 2-7) and petitioner was provided with a full and fair evidentiary hearing, with the assistance of counsel, Norman Smith, Esq., before the Honorable Joseph W. Parker, Judge Presiding. After a full and fair evidentiary hearing, Judge Parker entered a Judgment dated December 19, 1967, denying post-conviction relief. (A. pp. 27-30) Petitioner sought a Writ of Certiorari to review Judge Parker's Judgment denying post-conviction relief and Norman Smith, Esq., was court-appointed to represent the petitioner upon his petition for Writ of Certiorari to the North Carolina Court of Appeals. (A. p. 30) On March 14, 1968, the North Carolina Court of Appeals allowed the petition for Writ of Certiorari. (A. p. 38) On August 14,

1968, the North Carolina Court of Appeals affirmed Judge Parker's Judgment denying petitioner a new trial. CHARLES LEE PARKER v. STATE OF NORTH CAROLINA, 2 N.C. App. 27, 162 S.E.2d 526 (1968). (A. pp. 92-99)

On Thursday night, July 16, 1964, about 11:00 P.M., the petitioner, Charles Lee Parker, was arrested by officers of the Roanoke Rapids, North Carolina, Police Department as he walked into the yard and went up to a door of a house in Roanoke Rapids. On the preceding Sunday night at approximately 11:00 P.M., this house had been broken into and a female occupant raped. Petitioner was arrested and taken to the Roanoke Rapids Police Station where he was questioned. He refused to tell his name or where he was from. The questioning continued for an hour or two and afterwards petitioner was placed in a cell for the remainder of the night. He was not fed during the night. Sometime that night the police ascertained sufficient information of petitioner's identity and about 4:30 A.M., i.e., within six hours of petitioner's arrest, his mother was notified that he had been arrested. The following morning he was again questioned for about an hour, at which time he signed a confession. Early that morning the petitioner's mother employed the services of an attorney in Roanoke Rapids, George L. Cranford, Esq., who went to the Roanoke Rapids Police Station and talked with petitioner who told counsel that he had already confessed to the police. The attorney questioned petitioner as to whether, when he made the confession, had he been threatened in any manner, whether any promises were made to him, and whether he was scared at the time he made the statement. (A.pp. 66-67). Petitioner told counsel that no threats or promises had been made, and that he was not scared. (A.p.67). Drinking water was given petitioner the second time he was interrogated and two sandwiches after he had confessed. These events occurred prior to counsel's interview with petitioner, and counsel talked to petitioner the morning of July 17, 1969 between 9:30 and 10:30 A.M. (A. p. 71).

At the trial at the August 1964 Term of the Halifax County Superior Court, petitioner's mother was present and counsel discussed with her and the petitioner the nature and seriousness of the charge of first degree burglary against petitioner, and both Mrs. Viola Parker, petitioner's mother, (A. pp. 67-68) and the petitioner (A.p.68) signed written statements authorizing the entry of a plea of guilty to first degree burglary. At the time these statements were signed, petitioner and his mother realized that by entering such a plea he would be sentenced to life imprisonment pursuant to the provisions of N.C.G.S. 15-162.1. In his statement he also acknowledged that he had not been threatened or abused in any manner by any person and that no promises had been made to him if he pleaded guilty to any charge. Petitioner's signing of the statement was witnessed by Charlie D. Clark, Jr., Esq., an Attorney at Law of Roanoke Rapids, North Carolina, who wanted to be absolutely certain that petitioner knew what he was doing and the consequences of his act. (A. p. 73).

The tender of the plea of guilty was accepted by both the State and the Court, and prior to imposing sentence, the Judge Presiding at the trial examined the petitioner and his mother and made a finding that the petitioner understood the import of his plea and that it was made freely and voluntarily. (A. pp 46-47). Upon acceptance of the plea of first degree burglary, a capital offense, a mandatory life sentence was imposed.

## SUMMARY OF THE ARGUMENT

### I.

### THE PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED IN DISMISSING HIS CHALLENGE TO THE GRAND JURY WHICH HAD INDICTED HIM.

A. Petitioner's evidence does not establish the use of discriminatory practice.

Petitioner bases his claim of discriminatory jury practice

solely upon a statistical break-down of the population of Halifax County, North Carolina, and the percentage of Negro citizens who had previously served on grand juries. The only witness presented by petitioner rebutted the contention that there was intentional, arbitrary or systematic discrimination on account of race. Petitioner totally failed to reveal discriminatory jury practices since there was not one iota of evidence that the jury commissioners applied different standards of qualifications to the negro community than they did to the white community.

B. Petitioner has waived his right to quash the indictment when the issue of improper grand jury selection is first raised at a post-conviction hearing more than three years after his conviction.

Petitioner tended a plea of guilty in writing to the capital offense of first degree burglary. The petitioner did not, prior to the entry of the plea, move to quash the indictment based upon disqualification of members of the grand jury, as he may have done pursuant to the provisions of N.C.G.S. 9-23. Petitioner had been represented by counsel from early in the morning following his arrest, and counsel had spent two days with petitioner, and petitioner's mother, prior to the trial and the entry of the plea. It was not until three years after the entry of the plea that petitioner, in a petition for post-conviction hearing filed in the Halifax County Superior Court, first questioned the composition of the grand jury that had indicted him.

## II.

## THE MERE FACT THAT A DEFENDANT ENTERS A GUILTY PLEA TO A CAPITAL OFFENSE THEREBY INSULATING HIMSELF FROM THE IMPOSITION OF CAPITAL PUNISHMENT DOES NOT INVALIDATE THE GUILTY PLEA.

As stated by this Court in UNITED STATES v. JACKSON, "The fact that the Federal Kidnaping Act tends to discourage

defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily . . ." A review of this case reveals that none of petitioner's rights had been violated, and that his plea of guilty was freely, understandingly and voluntarily made. Petitioner has totally failed to show any coercion by the State, solely claiming that the statutory scheme caused his plea to be involuntary.

A. The Jackson Decision should not be retroactively applied.

The effect would be devastating if this Court were to retroactively apply its holding in UNITED STATES v. JACKSON. The statutory scheme condemned in JACKSON had been relied upon in many of the States and by the Federal Authorities. To now require that every conviction of a defendant who pled guilty when charged with a capital offense to be set aside, would be disastrous.

## III.

## THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS WERE NOT VIOLATED, HIS CONFESSION WAS NOT COERCED AND HIS GUILTY PLEA WAS NOT INVOLUNTARY.

Petitioner has been afforded a full and fair evidentiary hearing on all of these contentions, and after having had the opportunity to present his evidence, it is crystal clear that there is absolutely no merit to his contentions, as the Judge Presiding at the post-conviction hearing, has found. The evidence presented at the post-conviction hearing clearly indicates that none of the petitioner's rights have been violated.

## I.

## THE PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE NOT ABRIDGED IN DISMISSING HIS CHALLENGE TO THE GRAND JURY WHICH HAD INDICTED HIM.

## (a) PETITIONER'S EVIDENCE DOES NOT ESTABLISH THE USE OF DISCRIMINATORY JURY PRACTICE.

In the post-conviction judgment entered by the Honorable Joseph W. Parker, Judge Presiding at the post-conviction hearing, the court, after a full and fair evidentiary hearing, found as a fact:

> ". . . that the petitioner defendant was tried at said August Term, 1964, upon a bill of indictment returned by a properly and legally constituted grand jury, nine of which were selected at the first term of Halifax County Superior Court at the beginning of the spring session of 1964, and nine at the beginning of the fall session of said Court by a child under ten years of age from the regular jury panel summoned, at each term; that there was one Negro present on the grand jury which returned said bill of indictment a true bill; that there has been no systematic or purposely exclusion of persons of any race in selection of those for jury service by the Board of Commissioners of Halifax County; that said Commissioners have excluded from jury service persons white, Negro, Indian and others who in its opinion were infirmed in body or mind, had been convicted of felonies, or otherwise incompetent under the applicable provisions of law in North Carolina; . . ." (A. pp. 28-29)

At the post-conviction hearing, petitioner's witness, Frank D. Wilson, Register of Deeds of Halifax County, North Carolina, described how the jury and grand jury of that County were selected (A. pp. 55-58). It is clearly shown by petitioner's witness that the statutory procedure for the selection of jurors had been followed, and that the only place there had been a racial designation was on the tax books from which the names were taken. No racial designation appeared on the jury list from which the petit or grand jury was selected.

During the period of January 1960 through August 1964, ninety-nine grand jurors had been drawn and of these eight were Negro. No names were discarded because of race from the

jury box, for there was nothing to indicate race in the names in the jury box. When the jury commissioners were selecting the jury list from the tax records, no names were kept off the list because of race. The Commissioners, in accordance with N.C.G.S. 9-1 selected names on the basis of persons having good moral character, never convicted of a crime involving moral turpitude and who had sufficient intelligence to serve.[1] The Commissioners, who are selected from different districts in the county, selected persons known to them, and, on occasion, asked the Deputy Sheriffs and Tax Collector about the qualifications of persons not known to the Commissioners.

It is petitioner's contention that statistical evidence showing the presence of alleged discriminatory jury practices and the facts that the county tax lists from which the jury lists were made had racial designations established a prima facie case of systematic exclusion of members of petitioner's race from the grand jury which had indicted him. These facts would appear to bring the case within the holdings of this Court in WHITUS v. GEORGIA, 385 U.S. 545; JONES v. GEORGIA, 389 U.S.

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1 In 1964, N.C.G.S. 9-1 provided:

§ 9-1. Jury list from taxpayers of good character.—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

24, and SIMS v. GEORGIA, 389 U.S. 404, and place the burden upon the State to go forward with evidence. However, it is obvious that petitioner has not made out a prima facie showing of discrimination, unless the mere fact that relatively few Negroes had served on the jury is sufficient. Even so, it appears that petitioner's own witness rebutted this contention that there was intentional, arbitrary or systematic discrimination on account of race.

An examination of the evidence will show that petitioner's evidence indicates not the use of discriminatory jury practices, but what appears to be a method of jury selection somewhat similar to a blue ribbon method. Admittedly, a blue ribbon method jury selection has been found to be unconstitutional in the federal system, but there is no holding to be found declaring the use of such practices by a State to be unconstitutional. The Jury Commissioners in selecting names for the jury lists chose people, in accordance with the applicable statutes, whom they knew or were told to be of good moral character and of sufficient intelligence. While the tax lists were maintained in a segregated fashion, the jury lists were not. This being the case, no names could have been excluded or discarded from the jury lists because of race.

In SWAIN v. ALABAMA, 380 U.S. 202, 209, this Court stated that: ". . . an imperfect system is not equivalent to purposeful discrimination based upon race." When viewed in this light, we submit that petitioner has totally failed to sustain his burden of proving discriminatory jury practices since there is no evidence that the jury commissioners applied different standards of qualifications to the Negro community than they did to the white community.

(b) PETITIONER HAS WAIVED HIS RIGHT TO QUASH THE INDICTMENT WHEN THE ISSUE OF IMPROPER GRAND JURY SELECTION IS FIRST RAISED AT A POST-CONVICTION HEARING MORE THAN THREE YEARS AFTER HIS CONVICTION.

North Carolina General Statute 9-23 provides:

"Exceptions to qualifications of grand jurors.—All exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived . . ."

Almost seventy years ago the Supreme Court of North Carolina clearly stated that the North Carolina Constitution required the sustaining of a motion to quash an indictment of a negro who proves that members of his race had been systematically excluded from the juries of the county in which he had been indicted. STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814 (1902). Since 1902 it has never been doubted by the courts of the State of North Carolina that the systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by the grand jury. However, an objection to an indictment based on defects or irregularities in the drawing or organization of the grand jury must be taken by a motion to quash the indictment and may be made as a matter of right up to the time when the defendant is arraigned and enters his plea. The presiding judge has the discretionary power to permit the defendant to make the motion to quash the indictment as a matter of grace after the plea is entered and until the petit jury is sworn and impaneled to try the case on its merits. MILLER v. NORTH CAROLINA, 237 N.C. 29, 74 S.E.2d 513 (1953); NORTH CAROLINA v. GALES, 240 N.C. 319, 82 S.E.2d 80 (1954).

The Federal Court counterpart of N.C.G.S. 9-23 is Rule 12(b) (2) of the Federal Rules of Criminal Procedure which provides:

"Defenses and Objections based on defects in the institution of the prosecution or in the indictment or information

other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

In JACKSON v. UNITED STATES, 394 F.2d 114 (5th Cir. 1968), a case similar to this, the Court said:

". . . He is likewise barred from raising the question of the composition of the grand jury on the allegation of racial exclusion, being required by Rule 12(b) (2) of the Federal Rules of Criminal Procedure to allege such a defect by motion before trial, which he did not do then or at any other time during the proceeding on the merits. His failure to do so constitutes a waiver thereof so that he may not now, for the first time, more than two years after his trial, question the composition of the grand jury which indicted him . . . SHOTWELL MANUFACTURING CO. v. UNITED STATES, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963); PEREZ v. UNITED STATES, 5 Cir., 1962, 303 F.2d 441; PINKNEY v. UNITED STATES, 5 Cir., 1967, 380 F.2d 882."

Petitioner contends that he has not waived the right to have the indictment quashed because he did not "intentionally relinquish or abandon a known right or privilege." JOHNSON v. ZERBST, 304 U.S. 458, 464 (1938). N.C.G.S. 9-23 expressly states that "all exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived." If the intent to relinquish this right cannot be in-

ferred from the failure to assert the right, as required by statute, this State, all states and the federal government would be faced with the intolerable burden of showing the subjective state of a defendant's mind. The courts would be overwhelmed with defendants parading into court demanding new trials because it had not been their "considered choice" to waive their right to attack grand jury selection. While it is important that a defendant be convicted of crime in accordance with applicable constitutional requirements, it is equally important that reasonable diligence be required to the end that convictions may some day become final. The convicted person should not be permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands, before bringing his constitutional claims to the attention of a court. States have a right to assume that transactions are closed and settled within a reasonable time, and to rely upon finality of judgments.

The petitioner attempts to show that North Carolina's decisions in this area are inconsistent. A reading of the two cases cited by petitioner, NORTH CAROLINA v. RORIE, 258 N.C. 162, 128 S.E. 2d 229 (1962), and NORTH CAROLINA v. COVINGTON, 258 N.C. 501, 128 S.E. 2d 827 (1963) reveal they are not inconsistent. In RORIE the Supreme Court of North Carolina simply held that a motion to quash the indictment that is not seasonably made is waived. In COVINGTON the defendant did seasonably make his motion to quash the indictment, but later pled guilty. The Court held that the guilty plea standing alone was insufficient to show a waiver of the defendant's right to have the motion to quash duly heard. There is no inconsistency in these cases since in one the motion was seasonably made and in the other it was not.

## II

## THE MERE FACT THAT A DEFENDANT ENTERS A GUILTY PLEA TO A CAPITAL OFFENSE THEREBY INSULATING HIMSELF FROM THE IMPOSITION OF

## CAPITAL PUNISHMENT DOES NOT INVALIDATE THE GUILTY PLEA.

In UNITED STATES v. JACKSON, 390 U.S. 570 (1968) the selective death penalty provision of the Federal Kidnaping Act imposed an "impermissible burden upon the assertion of a Constitutional right". We submit the decision in JACKSON is limited to the statutory scheme established by the Federal Kidnaping Act and does not have wider applicability.

The Federal Rules of Criminal Procedure permit a defendant to plead guilty, or plead not guilty and be tried by a jury, or plead not guilty and waive a jury trial. (See Rule 23 (a) of the Federal Rules of Criminal Procedure.) Thus the defendant charged with kidnapping who asserts his right to a jury trial, faces "the risk of death" as the price of his "free exercise" of the Constitutional right. UNITED STATES v. JACKSON, *supra.*

A Federal jury trying a defendant pursuant to the provisions of the Kidnaping Act, until the JACKSON case, acted in a dual capacity. The jury was the trier of the facts, determining either guilt or innocence. If the jury found the defendant guilty, it then possessed the authority to designate the death penalty, thereby increasing the punishment imposed upon the defendant beyond the authority granted to the court in sentencing the convicted defendant.

The North Carolina Constitution, Article 1, Section 13, prohibits a trial upon a plea of not guilty "but by the unanimous verdict of a jury of good and lawful persons in open court . . ." This right cannot be waived. The defendant cannot plead not guilty and waive a jury trial. The determinative facts must be found by a jury. STATE v. MUSE, 219 N. C. 226, 13 S.E.2d 229 (1941); STATE v. HILL, 209 N. C. 53, 182 S.E. 716 (1935).

A defendant charged with a capital crime (first degree murder, first degree burglary, arson and rape) may plead not guilty and be tried by a jury, or he may plead guilty, and if

the court accepts the plea, the defendant must be sentenced to life imprisonment.[2] (See p. 4, *supra*). If the defendant pleads not guilty and if jury finds him guilty, the penalty is death unless the jury recommends mercy. (p. 4, *supra*)

The death sentence is imposed by statute upon the jury's finding the defendant guilty of a capital crime. The jury is not, as in the JACKSON case, usurping the province of the judge in sentencing the defendant, but serving as the trier of the facts. However, the jury is given the discretion in each of the capital crimes to recommend life imprisonment. This procedure parallels 18 U.S.C.A., Section 1111, wherein the penalty for murder in the first degree within Federal Jurisdiction is death, unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. The North Carolina jury in a capital case, as a Federal jury in a first degree murder case, is given the power to eliminate the automatic imposition of the death penalty upon a conviction of a capital crime.

The ability of the jury to mitigate the statutory punishment is contra to the unconstitutional burden imposed upon the defendant in the Federal Kidnaping Act. The North Carolina capital jury is given the ability to recommend mercy upon a capital conviction. The Federal jury, and only the jury, upon a conviction for kidnaping had the ability to impose the death penalty, rather than permit the court to impose a sentence for any term of years or for life.

In reviewing the difference between the Federal Kidnaping Act and the North Carolina Statutes, the Supreme Court of North Carolina in STATE OF NORTH CAROLINA v. OTIS EUGENE PEELE, 274 N. C. 106, 111, 161 S.E.2d 568, 572 (1968) stated:

"We think there are certain material differences in the

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[2] N.C.G.S. 15-162.1 (plea of guilty of first degree burglarly, arson or rape) was repealed by the 1969 Session of the North Carolina General Assembly on March 25, 1969. (Session Laws 1969, Ch. 117)

Federal Kidnaping Act and in North Carolina Statutes 14-21 and 15-162.1, and that JACKSON is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnaping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides that the death penalty shall be ordered unless the jury, at the times it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G. S. 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty, which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute. Except as provided in G. S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital felony. G. S. 15-187 provides the death sentence shall be executed '. . . against any person in the State of North Carolina *convicted* of a crime punishable by death . . .' (Emphasis added.)

"G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the JACKSON case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty. The possibility of a death penalty, however, has deterring effect—how much, no one knows . . ."

Additionally, an examination of the legislative history of the Federal Kidnaping Act and of the various North Carolina Statutes further reveal the inapplicability of JACKSON. The Federal Kidnaping Act as originally enacted in 1932, contained no provision for capital punishment. The 1934 amendment inserted the provision authorizing the death penalty "if the verdict of the jury shall so recommend." The decision in JACKSON held this amendment unconstitutional. Prior to 1934 a defendant could contest his guilt without risk of death. Under the 1934 amendment he could not.

Until 1949, the death penalty was automatically imposed in North Carolina upon a defendant convicted of a capital offense. The defendant, if convicted of a capital offense, received the only sentence permitted by law, death. However, in 1949, the proviso was added by amendment to each capital offense permitting the jury to recommend life imprisonment.

N.C.G.S. 15-162.1 permitting the entry of a guilty plea to a capital offense was not enacted until 1953. Prior to 1953, a capital defendant could not plead guilty to the capital charge. It is evident that N.C.G.S. 15-162.1 and the provisos added in 1949 to the various capital crimes permitting the jury to recommend life imprisonment are separate and distinct legislative provisions.

The North Carolina statutory scheme consisted of separate, distinct statutes, passed at separate times and each capable of standing alone, unlike the unitary scheme presented in the Kidnaping Act.

In JACKSON, supra, this Court held the infirmity of the death penalty provision of the Federal Kidnapping Act severable from the remainder of the Act, leaving the remainder in full force, and remanded for the entry of a plea free from the burden of the death penalty. In POPE v. UNITED STATES, 392 U.S. 651, 20 L. ed.2d 1317, 88 S. Ct. 2145, based upon JACKSON, this Court held the death penalty provisions of the Federal Bank Robbery Act (18 U.S.C. Sec. 2113(e)) was

invalid but the remainder of the Statute, the death penalty provision being separable, was valid. In JACKSON the defendant was yet to enter a plea to the indictment and in POPE the defendant was convicted by a jury and sentenced to death. Neither case is authority for the issue here presented. "Are all pleas of guilty in a statute containing a JACKSON type defect invalid?" We submit not. JACKSON is not authority for a conclusion of such broad constitutional impact and should not be applied to void every conviction where a defendant has entered a guilty plea. This Court stated in JACKSON that the Kidnaping Act "needlessly" penalized a defendant who stood on his right to plead not guilty before a jury—and Mr. Justice Stewart stated that defendants who acknowledged their guilt and wish to avoid the ignominy of public trial have traditionally been allowed to plead guilty, and, in addition, that a flexible and efficient judicial system requires the use of guilty pleas.

N.C.G.S. 15-4.1 provides, inter alia:

> ". . . , but a defendant without counsel cannot plead guilty to an indictment charging a capital felony . . ."

The right to counsel in capital felonies has been recognized in North Carolina since the very establishment of this State. In STATE v. HEDGEBETH, 228 N.C. 259, 45 S.E. 2d 563 (1947), the North Carolina Supreme Court said:

> "The Constitution of North Carolina, Art. I, sec.11, contains this provision: 'In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees or necessary witness fees of the defense, unless found guilty.' And this constitutional provision is further implemented by statute (G.S., 15-4) in these words: 'Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Session Laws 1777, C. 115).

*"In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G.S. 15-5, and by numerous decisions of this Court . . ."* (Emphasis added)

In JACKSON, the issue arose in the context of a burden being placed upon a plea of not guilty where only a jury trial upon that plea, but not a bench trial, could result in the death penalty. JACKSON is authority to void a scheme such as that presented in the Kidnaping Act, which burdened a defendant's right to a jury trial upon a plea of not guilty. It is not authority to hold invalid guilty pleas.

In JACKSON, this Court said:

> ". . . the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily . . ."
>
> 390 U.S. at 583.

The Opinion concludes:

> ". . . By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the Statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority."
>
> 390 U.S. at 591.

In light of various safeguards imposed prior to the acceptance of such pleas, this Court should not void pleas entered in a procedure so firmly entrenched in the history of the judicial system.

## A. THE JACKSON DECISION SHOULD NOT BE RETROACTIVELY APPLIED.

The rule relating to retroactivity was stated by this Court

in STOVALL v. DENNO, 388 U.S. 293, 18 L. Ed.2d 1999, 87 S.Ct. 1967 (1967) as follows:

> "Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. LINKLETTER v. WALKER, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed.2d 601, *supra;* TEHAN v. UNITED STATES ex rel SHOTT, (382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453,) *supra;* JOHNSON v. STATE OF NEW JERSEY, (384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882,) *supra.* 'These cases established the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application" . . .' JOHNSON, *supra* 384 U.S., at pp. 726, 727, 86 S.Ct. at 1777. *The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.*" (Emphasis added).

In UNITED STATES OF AMERICA ex rel BUTTCHER v. YEAGER, 288 F.Supp. 906, 909, District Judge Coolahan, in discussing the possible retroactive impact of JACKSON on the State of New Jersey, said:

> "In addition, the countervailing factors mentioned in the STOVALL decision are most strong in the circumstances of the present case. There can be no doubt that the New Jersey courts and law enforcement authorities have, since 1893, relied on the present system by which defendants pleading non vult to a murder indictment cannot be sentenced to more than life imprisonment. See STATE v. SULLIVAN, 43 N.J. 209, 243, 203 A.2d 177 (1964). Furthermore, the effect on the administration of justice, should it be determined that the JACKSON decision is

both retroactive and applicable to the New Jersey murder statute, would be disastrous, as every convicted murderer in New Jersey who, at the scheduled time for his trial, pleaded non vult to the indictment against him would be forthwith released from incarceration. This Court cannot conclude that the JACKSON decision is retroactive."

In KINCAID WILSON v. STATE OF NORTH CAROLINA, No. 2216, (E.D.N.C., February 27, 1969), District Judge Larkins in commenting upon the possible retroactivity of ALFORD v. NORTH CAROLINA, 405 F.2d 340, probable jurisdiction noted, No. 50. Fall Term, 1969, based upon the holding in JACKSON, stated:

"Another factor in the determination of the retroactive operation of a decision is the 'effect on the administration of justice.' TEHAN v. SHOTT, 382 U.S. 406, 418, 15 L.Ed. 2d 453, 461, 86 S.Ct. 459 (1966). In the TEHAN case, GRIFFIN v. CALIFORNIA, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), was not given retroactive operation because to 'require all those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.' TEHAN v. SHOTT, *supra*, 382 U.S. 406, 419. Since far more persons plead guilty than go to trial, the retroactive operation of ALFORD would be even more devastating.

"After full consideration of all the factors, this Court is not able to say that the rule in ALFORD v. STATE OF NORTH CAROLINA, *supra*, requires retroactive operation. This Court rejects the idea that if a statute was in force in 1963, and in 1968 its construction is changed so that it is no longer in force, it should be concluded that it was never in force. Quoting Justice Vinson in WARRING v. COLPOYS, 122 F. 2d 642, 647, certiorari denied 314 U.S. 678, 86 L.Ed. 543, 62 S.Ct. 184, 'It has often been

said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be down right chaotic.' Accordingly, the ALFORD rule shall only be applicable to those criminal actions commencing after November 26, 1968."

Commenting further upon ALFORD, District Judge Larkins, in CARMICHAEL v. STATE OF NORTH CAROLINA, No. 2102 (E.D.N.C., April 15, 1969) said:

"... the retroactive application of ALFORD would seriously disrupt the administration of the criminal laws within the State of North Carolina. If ALFORD were to be retroactively applied it could arguably necessitate the retrial of all defendants who have heretofore been convicted upon their pleas of guilty to indictments charging one of the capital crimes, or who, having been indicted for a capital offense, plead guilty to lesser included offenses. The Constitution does not require such a result. LINKLETTER v. WALKER, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965)."

The retroactive application of JACKSON has been the subject of several recent cases. The overwhelming weight of authority indicates that JACKSON is prospective in enforcement and not retroactive:

"This Court is asked to decide the issue of retroactivity only with respect to JACKSON as it applies to those who have pled guilty. The Court is of the opinion that JACKSON is not retroactive in this respect ...

"This factor, weighed with the purpose to be served by the JACKSON principle leads to the conclusion that purely prospective application is required ..." LONE v. UNITED STATES, (D.C.N. Calif.) — F. Supp. —, 5 Cr. L. 2248 (1969).

In PINDELL v. UNITED STATES, (D.C.Conn.) 296 F. Supp. 751, 753 (1969), the Court stated:

> "The petitioner alleges no other grounds for holding his plea involuntary. He asserts that as a matter of law, the potential death penalty alone is ground for a finding of coercion. This argument cannot be accepted, however, for doing so would amount to applying JACKSON retroactively . . .
>
> "As applied to the case at hand, the effect of the possible death penalty is simply a factor that can be considered in evaluating his claim that his plea was coerced; that judgment was entered on his guilty plea does not automatically require vacation of his sentence."

The LONE and PINDELL cases both deny retroactivity to JACKSON. A similar result was reached by the Court of Appeals of the District of Columbia in BAILEY v. UNITED STATES, 405 F.2d 1352 (1968). In the absence of actual coercion, courts have not retroactively applied JACKSON.

With respect to the Sixth Amendment right to a jury trial, upon which JACKSON was also bottomed, this right was not extended to the states through the Fourteenth Amendment until DUNCAN v. LOUISANA, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Prior to DUNCAN, a person involved in a State criminal proceeding did not have a constitutionally protected right to demand a jury trial. DUNCAN extended this right to state criminal proceedings. However, this Court subsequently held DUNCAN not to be retroactive.

> "We hold, however, that DUNCAN v. LOUISIANA . . . should receive only prospective application." DeSTEFANO v. WOODS, 392 U.S. 631, 633, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).

It is submitted that inasmuch as JACKSON was partially based upon the Sixth Amendment, which was only sub-

sequently applied against the States in DUNCAN, that retroactivity must be denied to JACKSON.

The ruling in JACKSON was not foreshadowed in any case. The law enforcement authorities of the Federal Government and of all the states and territories have heretofore proceeded on the premise that such procedures, as now condemned, were constitutional. The statutory scheme condemned in JACKSON was assumed to be constitutional by the Federal Government, and the governments of the various states and territories. The impact of no other decision of this Court, except for GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), can have such an impact upon the administration of justice. Court calendars will be disrupted nationally, and post-conviction proceedings overwhelmed, if JACKSON is retroactively applied. Delay is well known as the best friend of defense counsel, and if retrials are now required, now that memories have faded and witnesses and evidence are no longer available, we could expect that prison gates would be opening wide to all capital felons convicted upon their pleas of guilty due to the weight of evidence of their guilt amassed years previously at their trials, but now, most probably, no longer available. The results are so frightful and devastating that further comment should not be required.

Our studies have shown that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files of these inmates produce the finding that 68.8% of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. It has been estimated that ninety percent (90%) of all criminal convictions are by pleas of guilty. D. Newman, The Determination of Guilt or Innocence Without Trial 4 (1966). In McCARTHY vs. UNITED STATES, 394 U.S. 1038 (1969), this Court noted that 82% of all convictions in Federal District Court are based upon pleas of guilty or nolo contendere, a figure comparable to those for previous years.

North Carolina does not stand alone among the states upon

which the devastating impact of retroactivity would fall. In ALFORD the Fourth District also concluded that the State of New Jersey's non-vult procedure was also unconstitutional. (N.J.S.A. 2A:113-3, 4) and New Jersey would be faced with retrying all murder convictions obtained upon non-vult pleas.

Although the State of New York has abolished the death penalty, New York will face a similar dilemma, since, upon a guilty plea, life imprisonment was imposed under former procedures for murder. (N.Y. Code of Cr. Proc. Sec. 332.1). South Carolina now submits the question of punishment to a jury in every capital case, but retroactivity will also affect their former procedure. (S.C.Code Sec. 17-553.4).

We can also illustrate that the JACKSON defect exists in Louisiana (La. Code of Crim. Procedures, Art. 557), New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5), Wyoming (Wyo. Stat. Ann. Sec. 6-59), and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14). And, if these states assume their various statutes were constitutional, what then can be said for the Federal Government which established a lengthy list of criminal statutes with JACKSON defects. The federal statutes, containing JACKSON defects, commencing with the Federal Kidnaping Act (18 U.S.C. 1201 (a)), includes 18 U.S.C. 1111 (murder), 21 U.S.C. 176b (sales of narcotics to minors), 42 U.S.C. 2274-76 (atomic secrets) and 18 U.S.C. 2113(e) (bank robbery). In addition, retroactivity will affect convictions under D. C. Code Ann. Sec. 22-2801 (rape).[3] The impact upon these eight (8) states, North Carolina, New Jersey, New York, South Carolina, Louisiana, New Hampshire, Wyoming and Texas, and perhaps others which our research failed to discover—will be devastating indeed—as will be the impact upon the federal government in all cases of prosecution under the tainted statutes.

There is at present a heavy burden upon the administration

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[3] In BAILEY v. UNITED STATES, supra, the Court of Appeals for the District of Columbia held that JACKSON was only to be prospectively applied.

of justice in all courts across the land—and this state, and our sister states, cannot stand the devastating impact if retroactivity of these doctrines is to stand. Our courts are overcrowded. Our citizens are subjected to ever increasing violence. No court system can absorb the thousands of cases that retroactive application of JACKSON would create. Delays would increase, justice will creep, and respect for judicial procedures will be a mockery if, now, at retrials the various states will be forced to free infamous felons because the defense lawyer's best friend—delay—will have made evidence and witnesses unavailable, and if available, witnesses will now have memories dimmed by the passage of time.

The evidence and witnesses were available for the original trials, often many years ago, and, because of the weight of the evidence available, the defendants pled guilty to the charges. We submit that the proper administration of justice compels a denial of retroactivity.

## III

## THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FIFTH AMENDMENTS WERE NOT VIOLATED, HIS CONFESSION WAS NOT COERCED AND HIS GUILTY PLEA WAS NOT INVOLUNTARY.

The Honorable Joseph W. Parker, Judge Presiding, at the petitioner's post-conviction hearing, found as a fact:

> "Petitioner defendant was arrested at approximately 9:30 to 11:00 P.M. on July 16, 1964, while burglarizing, or attempting to burglarize the home of Mr. and Mrs. Silas M. Roland in the city of Roanoke Rapids, Halifax County, North Carolina, it being the identical home that he had a few nights previously burglarized and raped the female occupant; that he was carried to the ploice station and held for further investigation; that petitioner defendant refused to give his name and address and that, upon ascertainment by the officers of sufficient information of his identity, his mother, with whom he lived at the time,

was notified by the Police Department of Roanoke Rapids about 4:30 A.M. the following day, that is within approximately six hours of his arrest; that the mother of said petitioner defendant, upon the opening of the law office of Allsbrook, Benton, Knott, Allsbrook and Crawford early in the morning of July 17, 1964, employed the services of Honorable Dwight Cranford, a member of said firm, who is and was an experienced, learned, diligent and astute attorney and counsel at law, who immediately thereafter contacted said petitioner defendant and began preparation of his defense; that said petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant, Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, freely admitted his guilt of the capital offense of burglary and rape; . . . (A. p. 28).

". . . that as the record unquestionaly reflects, and the Court so finds as a fact, said petitioner defendant Charles Lee Parker, freely, voluntarily, without threat, coercion or duress, entered a plea of guilty to the offense of first-degree burglarly before His Honor Howard H. Hubbard at the August Term, 1964, of the Superior Court of Halifax County and was thereupon sentenced as required by law to the North Carolina State Penitentiary for the term of his natural life; . . . (A. p. 29).

. . .

". . . that no particular statement has been made at these hearings denying the truthfulness of the petitioner defendant's plea and guilt of the offense charged. To the contrary, petitioner defendant, in person and from the witness stand, under oath, has admitted on cross examination the truth of the charge." (A. pp. 29-30).

At the time of petitioner's arrest he would not tell the officers his name or his address. (A. pp. 40, 44 and 45). At the post-

conviction hearing the petitioner contended that he asked to see his lawyer and his mother at the time of his arrest, but he refused to tell the officers either his mother's or lawyer's names. (A. p. 44).

The record in this case is devoid of any prolonged or continuous interrogation by the officers. Petitioner does not contend that he was physically abused in any way. He had eaten supper the night of his arrest and was arrested about 11:00 P.M. He was questioned for an hour or two, after which he was placed in a cell for the remainder of the night. Petitioner's mother was advised on the night of his arrest the he was in jail. (A. p. 51) The following morning the petitioner was again questioned for about an hour, at which time he signed a confession. Early that next morning the petitioner's mother awaited the opening of a law office and employed the services of an attorney to represent her son. The attorney, Dwight Cranford, Esq., arrived and talked with the petitioner and was advised by petitioner, a few minutes after his confession, that no threats had been made, no promises had been made, and that he was not scared. (A. pp. 66-67). The attorney discussed the possible consequences and detils of the case with petitioner and with petitioner's mother. Petitioner asked the attorney to plead him guilty. The attorney spent most of two days discussing the case with petitioner and his mother. (A. p. 67). The petitioner and his mother both signed affidavits that the petitioner's plea of guilty was understandingly made as to the seriousness of the offense and the punishment. (A. pp. 67-68).

Charlie Clark, Esq., witnessed petitioner's signature to the affidavit concerning the plea of guilty, was told by the petitioner that he knew what he was doing and the consequences of pleading guilty. (A. p. 73). The record further shows that the Judge Presiding at the original trial questioned the petitioner as to his plea of guilty, also questioned the petitioner's mother, and found that the defendant, under oath, understood thoroughly the import of his plea and that it was freely and voluntarily made." (A. pp. 46-47).

The record also indicates that petitioner, before making his plea of guilty, confessed his guilt to his attorney in the presence of his mother. (A. p. 54). In addition, the petitioner, at the post-conviction hearing, under oath, confessed his crime. (A. pp. 44-45).

Apparently, the only reason petitioner is now complaining is because a boy in prison told him he was getting a "raw deal" (A. p. 49).

It is crystal clear that petitioner's confession was not used at his trial. It is equally clear that his confession was freely and voluntarily made. Petitioner and his mother, after two days of consultation with the petitioner's attorney, reached an independent decision to enter a plea of guilty.

Petitioner relies upon GALLEGOS v. COLORADO, 370 U. S. 49 (1962). Obviously, the facts in PARKER are so different from GALLEGOS, a case in which the defendant was kept incommunicado for six days without seeing a lawyer, his parents or any friendly adult, is of no value as precedent in this matter. Additionally, petitioner's reliance upon ESCOBEDO v. ILLINOIS, 378 U. S. 478 (1964) is also unavailing. Petitioner contends that he requested and was denied an opportunity to see a lawyer. The unquestioned facts are contrary to this assertion.

Finally, petitioner contends a lack of proof bearing on the voluntariness of petitioner's plea of guilty. If the procedural safeguards presented in this case are not sufficient, then what can be sufficient? Counsel spent two days with petitioner and his mother and obtained affidavits from each. Prior to petitioner signing his affidavit, an independant witness was obtained to question the petitioner as to the voluntariness of his execution of the affidavit. This written submission of a plea of guilty was required by statute to be accepted by both the State and the Court. At the trial both petitioner and his mother were questioned as to the voluntariness of the plea. In view of the foregoing, it is submitted that overwhelming proof has

been presented as to the voluntariness of petitioner's plea.

## CONCLUSION

For the foregoing reasons we respectfully submit that the opinion of the Court of Appeals of North Carolina be affirmed.

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COUNSEL FOR RESPONDENT.

## *CERTIFICATE*

I, JACOB L. SAFRON, one of the attorneys for the Respondent, hereby certify that on September 5, 1969, I served a typewritten final copy of the foregoing Brief on the Attorney of Record for the Petitioner, Norman B. Smith, Esq., by handing and leaving with him personally, at Greensboro, North Carolina, a typewritten copy of the foregoing Brief.

JACOB L. SAFRON
Staff Attorney

Sworn to and subscribed before me
this 17 day of September, 1969.

FRANCES PARRISH
NOTARY PUBLIC
My Commission Expires: 4-10-71